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No. 82-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.

and

NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.

and

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF FOR THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Industrial Transportation League (hereinafter the League) respectfully moves the Court for leave to file the attached brief *amicus curiae* in this case in support of respondent, as provided in Rule 36 of the Rules of this Court. Respondent has consented to the filing of such a brief. Petitioners were requested to consent but have declined to give such consent.

The League is a non-profit, incorporated trade association whose members include a large number of motor

carrier shippers, groups and associations of such shippers, boards of trade, and the like located throughout the United States. The members of the League, while utilizing all forms of transportation, are substantial users of the transportion services provided by motor carrriers of property in both intrastate and interstate commerce. The League is the largest organization representing the shippers – large, medium and small – who call upon such motor carriers for transportation of a tremendous variety of commodities.

The rates and charges which the League's members pay to motor carriers for their transportation services, both intrastate and interstate, are generally published in tariffs which are filed either with the Interstate Commerce Commission for transportation in interstate commerce, or with various agencies of the individual states (in most cases) for intrastate transportation. A substantial portion of such tariff publications contain rates, charges and related matters which are established after collective action by the motor carriers, acting in established groups which are generally known as rate bureaus. Insofar as it involves interstate transportation, such collective activity is immune from the application of the federal antitrust laws by the provisions of the Reed-Bulwinkle Act of 1948, as amended, 49 U.S.C. §10706(b).[1] These immunity provisions of the Interstate Commerce Act were substantially amended by the Motor Carrier Act of 1980.[2] The League and many of its members were intimately involved in the legislative deliberations which led to the Motor Carrier

[1]Ch. 491, §1, 62 Stat. 472 (Jan. 17, 1948), recodified Pub. L. 95-473, 92 Stat. 1377 (Oct. 17, 1978).

[2]Sec. 14, Pub. L. 96-296, 94 Stat. 803, 808 (July 1, 1980).

Act of 1980. It supports the new ratemaking freedoms given to motor carriers by Congress, and the transportation policy set out in 49 U.S.C. §10101(a)(2). In order to carry out that policy, it is the League's position that antitrust immunity should not be granted to motor carriers for the purpose of collectively setting rates.

For the same reasons, the League takes a similar position with respect to motor carriers engaged in intrastate transportation of property. The parties to this case are, of course, concerned with the application of the antitrust immunity doctrines at issue here to their specific factual circumstances. The League, however, is more concerned with the broader impact the Court's determinations of the issues presented will have on the permissible scope of the activities of the large number of motor carrier rate bureaus involved in intrastate collective ratemaking. The attached brief is submitted in the hope of assisting the Court in making these determinations.

Wherefore, it is respectfully prayed that this motion for leave to file the attached brief *amicus curiae* be granted.

Respectfully submitted,

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BRIEF FOR THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE AS AMICUS CURIAE

SUMMARY OF ARGUMENT

The state action immunity from the antitrust laws protects collective activity by motor carriers jointly to establish rates and charges within a particular state only to the minimum extent necessary to permit the state regulatory scheme to function. Moreover, unless the state compels motor carriers to engage exclusively in a non-competitive process for establishing such rates, the para-

mount federal interest in a competitive economy must be protected.

Finally, the *Noerr-Pennington* doctrine protects from the antitrust laws collective action to influence the government to take anticompetitive action, regardless of intent or purpose. However, the doctrine does not apply if the facts show conduct which constitutes independent acts not involving the type of activity protected by the doctrine.

ARGUMENT

Petitioners argue that their collective intrastate ratemaking activity is immune from the federal antitrust laws on two independent grounds, the state action doctrine and protected activity under the *Noerr-Pennington* doctrine. These arguments will be addressed separately below.

I. State Action Immunity

A. The State Action Immunity from the Federal Antitrust Laws Must Be Applied Only To The Minimum Extent Necessary.

Petitioners in this case argue first that the doctrine of state action immunity first enunciated by this Court in *Parker* v. *Brown,* 317 U.S. 341 (1943) requires reversal of the decision of the Court of Appeals.[1] Before discussing the application of that doctrine, the doctrine must be placed in its proper context.

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[1]The case below was heard and decided *en banc* by the "former Fifth Circuit" under the provisions of Section 9 of the Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. 96-452, 94 Stat. 1994 (October 14, 1980). However, apparently because of the provisions of Section 11 of that Act, this Court has directed its writ of certiorari to the Eleventh Circuit.

It is available to prevent application of the federal antitrust laws only when a determination is made "that exemption was necessary in order to make the regulatory Act work, 'and even then only to the minimum extent necessary.' " *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 597 (1976).

The different state statutes and the varying schemes for regulation of intrastate motor carrier rates and ratemaking must each be viewed astringently, so that only such immunity is applied as is necessary to allow the expressed policy of the particular state to be given effect. The state action doctrine provides immunity only when, in the first instance, "the conduct is pursuant to a 'clearly articulated and affirmatively expressed state policy' to replace competition with regulation."[2] Therefore, even when the doctrine applies, no more than such anticompetitive conduct as contemplated by the state may be immunized.

B. The Applicable Standard For State Action Immunity Requires That The States Compel the Motor Carriers To Engage In Anticompetitive Conduct.

In view of the principle that an implied immunity from the antitrust laws must be strictly construed, this Court has developed a test for determining whether to apply the doctrine to a particular set of factual circumstances. Before determining how to apply the appropriate test with respect to any particular state, however, the identity of the persons seeking to invoke the state action immunity as a defense is an important consideration. There is no claim that the states involved are acting directly, and therefore

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[2] *Hoover v. Ronwin*, ____ U.S. ____, 42 USLW 4535, 4538 (1984).

are immune as sovereigns from the antitrust laws. *Hoover* v. *Ronwin, supra,* 52 USLW at 4539 and *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 791 (1975). What is present here, as in most states, is a mixture of public and private decisionmaking involving both the motor carriers engaged in collective ratemaking and the state regulatory agencies which allow such activities under discretionary delegations by the state legislatures.

The motor carriers and their rate bureaus continue to have "sufficient freedom of choice" to conclude that they must be held responsible under the antitrust laws for the consequences of their actions. *Cantor* v. *Detroit Edison, supra,* 428 U.S. at 593. Therefore, in cases such as this one, where the petitioners claim they are acting as non-sovereign representatives authorized by the states to act in an anticompetitive fashion to establish motor carrier rates, this Court must require a demonstration by the motor carriers of a high degree of direction and involvement by the state. The test that has been developed by this Court in a number of recent cases (and was summarized by the Court in the recent decision in *Hoover* v. *Ronwin, supra,* 52 USLW at 4538), requires a clearly articulated statement of state policy choosing a non-competitive environment and an active state supervision of the policy:

> Closer analysis is required when the activity at issue is not directly that of the legislative or supreme court, but is carried out by others pursuant to state authorization. *See, e.g., Community Communications Co.* v. *City of Boulder,* 455 U.S. 40 (1982) (municipal regulation of cable television industry); *California Liquor Dealers* v. *Midcal Aluminum,* 445 U.S. 97 (1980) (private price-fixing arrangements authorized by State); *New Motor Vehicle Board of California* v. *Orrin*

> *W. Fox Co.*, 439 U.S. 96 (1978) (new franchises controlled by state administrative board). In such cases, it becomes important to ensure that the anti-competitive conduct of the State's representative was contemplated by the State. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 413-415 (1978) (opinion of Brennan, J.); see *New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363, 369-370 (CA9 1974). If the replacing of entirely free competition with some form of regulation or restraint was not authorized or approved by the State then the rationale of Parker is inapposite. As a result, in cases involving the anti-competitive conduct of a non-sovereign state representative the Court has required a showing that the conduct is pursuant to a "clearly articulated and affirmatively expressed state policy" to replace competition with regulation. *Boulder, supra,* at 54. The Court also has found the degree to which the state legislature or supreme court supervises its representative to be relevant to the inquiry. See *Midcal Aluminum, supra,* at 105; *Goldfarb, supra* at 791. [footnote omitted] 45 USLW at 4538.

The Court of Appeals correctly recognized that, in order to satisfy the first part of the test set out in *Hoover* v. *Ronwin, supra,*[3] actions by the state as sovereign compelling the private motor carrier rate bureaus to engage in anticompetitive conduct must be present. As both *Cantor, supra,* 428 U.S. at 593, and *Goldfarb, supra,* 421 U.S. at

[3]Although that decision occurred after the court of appeals decision under review, it broke no new ground but summarized the development in prior decisions of this court of the state action doctrine as it applied to private parties. Compare *U.S.* v. *SMCRC, supra,* 702 F.2d at 535-541, which analyzes the same cases.

791, point out, an absence of freedom of choice for the private parties is an essential element of the doctrine. Evidence of compulsion (i.e. an absence of freedom of choice) is the best evidence that there has been a clear articulation of a state policy to have private motor carriers act in a manner contrary to the federal antitrust laws by collectively establishing their rates and charges.

The Court of Appeals correctly analyzed the state statutes involved, and found that there were no provisions requiring or compelling collective activity. It recognized that there was a greater or lesser degree of state regulation of motor carrier rates and charges. But, as the court below pointed out, there certainly was no action by the state legislature to require or direct the motor carriers to act *collectively* to establish the rates which are thereafter subject to regulation. *U.S.* v. *SMCRC,* 702 F.2d at 537. At best, the statutes involved allow, but do not require, collective action. In short, they do not "replace competition with regulation." *Hoover* v. *Ronwin, supra,* 52 USLW at 4538.

This Court has long recognized the primacy of the federal interest in free competition over less substantial state interests. *California Liquor Dealers* v. *Midcal Aluminum,* 445 U.S. 97, 110-111, 113-114 (1980). Unless and until a state acts to compel non-competitive collective ratemaking by motor carriers to the exclusion of "free and unfettered competition"[4] the ascendancy of the antitrust laws must be protected.[5] It would not be protected if the

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[4]*Northern Pacific R. Co.* v. *United States,* 356 U.S. 1, 4 (1958).

[5]Given the principle that the Sherman Act, in particular, encompasses the full reach of the Commerce Clause, *Midcal, supra,* 445 U.S. at 111, there can be doubt that the federal antitrust laws are applicable to collective activities otherwise beyond the scope of other federal regulatory statutes. Cf. *U.S.* v. *SMCRC,* 439 F. Supp. 29, 33-38 (N.D. Ga., 1977).

state action immunity could be invoked when there is a scheme of regulation which only partially displaces competition, no matter how pervasive it may be.

Shippers who utilize motor carriers for intrastate transportation services must be able to depend, to the fullest extent possible, on the operation of free markets to provide them with a wide range of price and service options. Only when a particular state clearly articulates and actively supervises a policy that relies exclusively on a non-competitive environment for the establishment of intrastate motor carrier rates should shippers be prevented from realizing the benefits of free competition in the intrastate motor carrier industry. As long as a state regulatory scheme allows motor carriers the freedom to choose between either competitive or non-competitive courses of conduct, then the federal interest in enforcing the national policy in favor of competition must be given priority.

II. *Noerr-Pennington* Immunity

Petitioners also contend that the *Noerr-Pennington* doctrine immunizes their actions from application of the antitrust laws. That doctrine, as developed by *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight Inc.*, 365 U.S. 127 (1961) and its progeny, states that efforts to influence the government to take anticompetitive action cannot be the basis of antitrust liability. Since this immunity doctrine is based on the right of petition under the U.S. Constitution, Amendment I,[6] (*California Transport*

[6]"Congress shall make no law . . . . abridging . . . the rig'ıt of people to peaceably assemble, and to petition the Government for a redress of grievances."

v. *Trucking Unlimited,* 404 U.S. 508, 510-511 (1972)), the immunity:

> "Shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.
>
> * * *
>
> "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."

United Mine Workers v. *Pennington,* 381 U.S. 657, 670 (1965). The doctrine includes within its scope joint activities supporting the petitioning activity, in order to make it effective and meaningful. *See Feminist Women's Health Center* v. *Mohammad,* 586 F.2d 530, 543 (5th Cir., 1978), *cert. den.* 444 U.S. 924 (1979).[7]

Of course, as the district court and the court of appeals in this case pointed out,[8] if the facts developed in a particular case demonstrate the existence of "independently cognizable acts outside the scope of First Amendment protection or the *Noerr-Pennington* doctrine." (672 F.2d at 477, quoting from 467 F. Supp. at 485), then antitrust immunity is not available.

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[7] *Cf. State of Missouri* v. *National Oreganization for Women,* 620 F.2d 1301, 1314-1316 (8th Cir.), *cert. den.* 449 U.S. 482 (1980), where it was held that an economic boycott intended primarily to influence political action was not illegal under the antitrust laws.

[8] The *en banc* court of appeals adopted that portion of the court of appeals panel's opinion on *Noerr-Pennington* (702 F.2d at 542). The panel in turn adopted almost entirely the district court's analysis. See 672 F.2d at 476-77 and 467 F. Supp. at 484-85.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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